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IN THE
COURT OF APPEALS OF INDIANA

RYAN D. SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 57A05-0712-CR-740
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Michael J. Kramer, Judge
Cause No. 57D02-0705-CM-493

June 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Ryan D. Smith appeals his conviction for Reckless Driving,[1] a class B misdemeanor, arguing that the evidence is insufficient. Smith also argues that the trial court abused its discretion in imposing the ninety-day executed sentence because it allegedly relied on evidence outside of the record and that the sentence is inappropriate in light of the nature of the offense and his character. Finding no error, we affirm.

FACTS

On May 22, 2007, Smith was driving his black Camaro in a residential area of Noble County when Noble County Sheriff's Department Officer Duane Ewell activated his radar unit and clocked Smith's vehicle driving at eighty miles per hour. The posted speed limit on the section of road on which Smith was driving was forty-five miles per hour. Officer Ewell activated his lights and pursued Smith, following him down several streets and observing that Smith's vehicle was leaving marks on the pavement caused by spinning tires sliding during a turn. Officer Ewell also observed "dirt and gravel in the air" at an intersection where Smith's vehicle turned. Tr. p. 12. The officer eventually reached Smith and arrested him. Both Smith and Officer Ewell had observed vehicles on the roadways on Smith's route prior to his arrest.

On May 23, 2007, Smith was charged with class B misdemeanor reckless driving. At the November 30, 2007, bench trial, Officer Ewell testified that his radar unit is calibrated and certified yearly and that at the beginning of each shift, he tests the unit with a tuning fork. He also testified that the radar unit's measurement of Smith's speed at eighty miles per

[1] Ind. Code § 9-21-8-52.

hour was consistent with his visual observation of the vehicle. Id. at 7-8. The trial court found Smith guilty as charged and sentenced him to a ninety-day executed sentence. Smith now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Smith first argues that the evidence is insufficient to support his conviction. In reviewing the sufficiency of the evidence, we neither reweigh the evidence nor assess the credibility of witnesses. Alkhalidi v. State, 753 N.E.2d 625, 627 (Ind. 2001). We will consider only the evidence favorable to the verdict and all reasonable inferences that may be drawn therefrom, affirming unless no rational factfinder could have found the defendant guilty beyond a reasonable doubt. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005).

To convict Smith of class B misdemeanor reckless driving, the State was required to prove beyond a reasonable doubt that he recklessly operated a vehicle at an unreasonably high rate of speed, endangering the safety or property of others. I.C. § 9-21-8-52. Proof of speeding creates the presumption of reckless driving, Todd v. State, 566 N.E.2d 67, 70 (Ind. Ct. App. 1991), abrogated on other grounds by Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007), and although "unreasonably high rate of speed" has not been defined by the legislature, Indiana courts have found that drivers operating at fifteen, id., and forty miles per hour over the speed limit, Taylor v. State, 457 N.E.2d 594, 598 (Ind. Ct. App. 1983), committed reckless driving.

Here, Officer Ewell testified that he activated his radar unit and clocked Smith driving eighty miles per hour in a residential area with a forty-five-mile-per-hour speed limit sign posted on the road. Tr. p. 5-6, 8, 15-16. As the officer pursued Smith, he observed Smith's vehicle leaving marks on the road caused by spinning tires sliding during a turn and saw dirt and gravel in the air at an intersection where Smith's vehicle had turned. Id. at 9-12, 16. Officer Ewell further testified that his radar unit is calibrated and certified yearly and that he tests the unit with a tuning fork at the beginning of each shift. Id. at 6-7. This evidence establishes that Smith was driving thirty-five miles per hour over the speed limit, which the trial court properly found to be an unreasonably high rate of speed. And it was reasonable for the trial court, as factfinder, to have drawn an inference from the fact that because Smith was driving at such high speeds through a residential area with other vehicles on the roads, his actions endangered the life or property of others. Smith's arguments to the contrary amount to requests that we reweigh the evidence and assess witness credibility—practices in which we do not engage when evaluating the sufficiency of the evidence supporting a conviction. Ultimately, therefore, we find the evidence sufficient to support Smith's conviction.

II. Sentencing[2]

A. Abuse of Discretion

Smith first argues that the trial court abused its discretion in sentencing him because it

[2] At the outset, we acknowledge that the State argues that Smith's appeal is moot, inasmuch as he has likely already finished serving the ninety-day sentence. Because there is no evidence of that fact in the record and Smith's attorney avers that he is not certain that his client has, in fact, completed the sentence, we will address Smith's arguments on their merits.

allegedly relied on matters outside of the record. In Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on rehearing, 875 N.E.2d 218 (2007), our Supreme Court held, among other things, that we review sentencing decisions for an abuse of discretion. A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. 868 N.E.2d at 490-91.

Here, the trial court made the following sentencing statement:

> I guess considering everything including the fact that you have a prior conviction for the very same offense and have other contacts with the court and I think at the time of your prior reckless driving I see that where you had a sentence in Ohio and then at the time of your probation violation had sentence in Elkhart County that you I believe had work release. But I'm going to sentence you to 90 days in the Noble County jail with one day credit and I'll also impose a 120 day license suspension. If you obey the rules out at the jail there are 44 days that you actually have to serve. I guess I'm taking into account the fact that you ended up serving 60 days on your last conviction for the same offense and I think the sentences go up rather than down.

Tr. p. 40-41. Smith argues that he never admitted the existence of the Ohio conviction and that although he admitted the previous reckless driving conviction, he denied that he had served a 60-day sentence as a result of that conviction.[3]

The following discussion took place before the trial court sentenced Smith:

> Court: Have you ever, do you have any other prior convictions? Have you ever been in court for anything else?
>
> Smith: Yes I've got um, some receiving stolen properties.
>
> Miller [Smith's attorney]: That's pending isn't it?

[3] As is often the case with a misdemeanor, no presentence report was prepared.

Smith: I got one that's pending but I've been convicted of some like in the past.

Blackman [prosecutor]: Um, do you also have a prior reckless driving in 2002?

Smith: Yes.

Blackman: . . . A review of Mr. Smith's driving record indicates . . . numerous speedings [sic] and . . . other moving violations . . . . I do note that when on that prior reckless driving your honor had given a sentence uh, that was suspended uh, and with probation and he was not successful on probation and was ultimately uh, probation was revoked and he got 60 days uh, in Noble County jail . . . .

Court: Well I guess it concerns me that you do have prior contacts with the court plus a prior reckless driving five years ago.

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Miller: . . . I don't know where that[] information [about serving sixty days in Noble County Jail] is coming from.

Court: So you're saying you do not have a [prior] conviction for reckless driving?

Miller: He has the conviction but he doesn't, he's never served, he never got sentenced to 60 days.

Blackman: I'm sorry I misspoke . . . if he did serve a sentence on that [reckless driving conviction] it may not have been through the Noble County jail. But I do show a sentence of 60 days on a probation violation in the reckless driving case . . . .

Court: That's what the court's records show as well is that your probation was revoked and . . .

Blackman: So if I did say that 60 days in Noble County Jail I did misspeak then and I do apologize.

Tr. p. 37-40. It appears, therefore, that there was a genuine dispute about whether, where, and under what circumstances Smith served the sixty-day sentence stemming from his prior reckless driving conviction. Furthermore, Smith is correct that there was no mention of an

Ohio conviction before the trial court commented on it in the final sentencing statement. Under these circumstances, we are compelled to find that the trial court abused its discretion by entering a sentencing statement that included reasons for the sentence imposed that are not supported by the record.

It has been established, however, that even if a trial court is found to have abused its discretion in the process it used to sentence the defendant, the sentence may be upheld on appeal if it is appropriate in accordance with Indiana Appellate Rule 7(B). Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007) (holding that in the absence of a proper sentencing statement, we may either remand for resentencing or exercise our authority to review the sentence pursuant to Rule 7(B)); Felder v. State, 870 N.E.2d 554, 558 (Ind. Ct. App. 2007) (applying Windhorst to find that, notwithstanding the trial court's abuse of discretion during the sentencing process when it failed to consider the defendant's guilty plea to be a mitigating factor, the sentence was appropriate, thereby affirming the trial court).

To that end, we note that in reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). The advisory sentence is "the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). A person who commits a class B misdemeanor shall be imprisoned for a fixed term of not more than one hundred eighty days. Ind. Code § 35-50-3-3. Here, the trial court imposed a ninety-day sentence on Smith—one-half of the maximum sentence he

faced.

As for the nature of Smith's offense, he drove his vehicle thirty-five miles per hour above the speed limit through a residential area, leaving skid marks on the pavement and kicking dirt and gravel into the air as he passed. As for Smith's character, at the least, he has admitted that he has been convicted of reckless driving before and that there was a charge of receiving stolen property pending at the time he was sentenced for the instant offense. We find that the ninety-day executed sentence was not inappropriate in light of the nature of the offense and Smith's character.

The judgment of the trial court is affirmed.

KIRSCH, J., and BAILEY, J., concur.